No. 89-409

(2)

In the Supreme Court of the United States

OCTOBER TERM, 1989

CITY OF MILWAUKEE, ET AL., PETITIONERS

v.

CLAYTON K. YEUTTER, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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15 pp

QUESTION PRESENTED

Whether the Commodity Credit Corporation's regulations for implementing the Cargo Preference Laws, 46 U.S.C. 1241(b)(1), are reasonable and consistent with that statute.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 877 F.2d 540. The opinion of the district court (Pet. App. 19-30) is reported at 688 F. Supp. 479.

JURISDICTION

The judgment of the court of appeals (Pet. App. 17-18) was entered on June 8, 1989. The petition for a writ of certiorari was filed on September 6, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Congress enacted the Cargo Preference Laws, 46 U.S.C. 1241(b), to foster and preserve a strong American merchant marine by directing the federal government to favor U.S.-flag vessels when the government ships certain goods overseas. Before 1985, the Cargo Preference Laws provided:

> Whenever the United States shall procure, contract for, or otherwise obtain for its own account, or shall furnish to or for the account of any foreign nation without provision for reimbursement, any equipment, materials, or commodities, within or without the United States, or shall advance funds or credits or guarantee the convertibility of foreign currencies in connection with the furnishing of such * * * commodities, the appropriate agency or agencies shall take such steps as may be necessary and practicable to assure that at least 50 per centum of the gross tonnage of such * * * commodities * * * which may be transported on ocean vessels shall be transported on privately owned United States-flag commercial vessels, to the extent such vessels are available at fair and reasonable rates for United States-flag commercial vessels, in such manner as will insure a fair and reasonable participation of United States-flag commercial vessels in such cargoes by geographic areas.

In December 1985, Congress amended the Cargo Preference Laws by adopting the Food Security Act of 1985, Pub. L. No. 99-198, § 1142, 99 Stat. 1491. The 1985 amendments increased the annual minimum percentage of cargo to be carried by U.S.-flag vessels

from 50% to 75%. § 1142, 99 Stat. 1491-1492.[1] The 1985 amendments also established a Great Lakes "set-aside provision" or "Grandfather Clause" for calendar years 1986 through 1989: the amendments directed the government to "take such steps as may be necessary and practicable without detriment to any port range" to preserve the percentage of certain food commodities that were exported from Great Lakes ports during 1984. § 1142, 99 Stat. 1492.[2]

b. This case concerns the Cargo Preference Laws' application to shipments under Title II of the Agriculture Trade Development and Assistance Act of 1954 (Title II), 7 U.S.C. 1721 *et seq.* Title II, also known as the "Food for Peace" program, authorizes the President "to determine requirements and furnish agricultural commodities" in order "to combat famine and malnutrition" and to "promote economic and community development in friendly developing areas." 7 U.S.C. 1721(a). Under Title II, commodities under the program are to be provided by the Commodity Credit Corporation (CCC), a component of the Department of Agriculture. 7 U.S.C. 1721(a). Title II authorizes the CCC to pay the cost of acquiring, processing, packaging, and transporting the com-

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[1] Congress also changed the calendar year for purposes of administering the Act by providing that "for effective and equitable administration of the cargo preference laws the calendar year for the purpose of compliance with minimum percentage requirements shall be for 12 month periods commencing April 1, 1986." § 1142, 99 Stat. 1492.

[2] Specifically, the 1985 amendments charged the Secretary of Transportation to "take such steps as may be necessary and practicable without detriment to any port range to preserve during calendar year 1986, 1987, 1988, and 1989 the percentage share, or metric tonnage of bagged, processed, or fortified commodities, whichever is lower, experienced in cal-

modities from the commodity supplier's plant to the foreign destination. 7 U.S.C. 1723.

In 1987, the CCC promulgated revised regulations, 7 C.F.R. Pt. 1496, for implementing Title II in light of the Cargo Preference Laws. Under those regulations, the CCC delegates procurement to the Kansas City Commodity Office (KCCO) of the Department of Agriculture's Agricultural Stabilization and Conservation Service. 7 C.F.R. 1496.2. The KCCO analyzes commodity prices, land-transportation costs, and published ocean freight rates to determine the lowest price for a particular shipment of Title II cargo. See 7 C.F.R. 1496.5.[3] To meet its obligation under the Cargo Preference Laws, the KCCO looks to "only higher-priced United States-flag ship rates for the portion of its commodities that it believes is necessary to meet its obligations under the [law] on a nationwide basis." Pet. App. 37. The KCCO then permits foreign-flag vessels to compete for the remaining cargo. *Ibid.* In other words, the KCCO construes the Cargo Preference Laws to apply the 75% goal for

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endar year 1984 as determined by the Secretary of Agriculture, of waterborne cargoes exported from Great Lake ports pursuant to title II." 42 U.S.C. App. 1241f(c)(2)(B) (Supp. V 1987).

[3] The KCCO awards contracts that, in general, are based on "the lowest landed cost." 7 C.F.R. 1496.5. Section 1496.5(a) provides:

> Lowest landed cost will be calculated on the basis of U.S. flag rates and service for that portion of the commodities being purchased that CCC determines is necessary and practicable to meet cargo preference requirements and on an overall (foreign and U.S. flag) basis for the remaining portion of the commodities being purchased.

U.S.-flag ships to all of its shipments from the United States in a particular year.

2. Petitioners, entities with shipping interests in the Great Lakes region, filed this action contending (among other things) that the CCC's regulations were contrary to the Cargo Preference Laws. Petitioners alleged that the 75% goal for U.S.-flag vessels should be applied individually to each U.S. port. Under petitioners' view, if a port has no U.S.-flag ships, then the CCC could use exclusively foreign-flag ships. This is important to petitioners because very few U.S.-flag ships serve the Great Lakes region. Pet. App. 2-3.

The district court granted summary judgment for petitioners. Pet. App. 19-20. The court reasoned that the "plain words" of the Cargo Preference Laws precluded respondents from applying the Act on a nationwide basis. *Id.* at 23. The court relied on the clause in the Act that directs government agencies to apply the law "in such manner as will insure a fair and reasonable participation of United States-flag commercial vessels in such cargoes by geographic areas." 46 U.S.C. 1241(b)(1). The court stated that "[t]he requirement that the agency act to insure a fair and reasonable participation by geographic area forecloses an application of the [law] based on straight nationwide participation." *Milwaukee* v. *Brock*, No. 85-C-1509 (E.D. Wis. June 15, 1988), slip op. 17.

3. The court of appeals reversed.[4] The court upheld the CCC's decision to apply the 75% goal in the

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[4] Petitioners did not defend the judgment on the basis of the district court's reasoning. Both sides agreed that the district court's interpretation of the phrase "by geographic area" was in error because that phrase refers to the point of

Cargo Preference Laws on a nationwide basis, rather than to individual ports. Relying on *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court reasoned: "In the ordinary course, the agencies charged with making the program work may make choices of this sort unless the statute and its history show that Congress has made the choices itself." Pet. App. 9. The court of appeals found, however, that the Cargo Preference Act did not expressly "speak to the question" whether the 75% goal must be applied on a nationwide basis. *Id.* at 10.

The court of appeals further ruled that the CCC's regulations were reasonable in light of the structure and purpose of the Cargo Preference Laws. In particular, the court noted that "the structure of § 1241(b)(1) and § 1241f supports the government's position." Pet. App. 11. The court explained that "[t]he Great Lakes grandfather clause [§ 1241(b)(1)] and the new accounting year in § 1241f make sense only if KCCO is entitled to use a nationwide baseline; if, as Milwaukee submits, the government must proceed port-by-port, it is quite unnecessary to protect the Great Lakes from diversions." *Id.* at 10-11.

ARGUMENT

The decision of the court of appeals is correct. In addition, petitioners acknowledge that the decision below does not conflict with the decision of any other court. Indeed, petitioners observe (Pet. 9) that this case is one "of first impression," and that the legal

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destination, not the port of departure. The court of appeals also agreed that the district court's reading of the clause was contrary to the plain meaning of the Cargo Preference Laws. Pet. App. 7-9.

issue is "unique[]." Thus, no further review is warranted.

1. Petitioners contend that the 75% goal of the Cargo Preference Laws applies only to cargo where U.S.-flag vessels are "available" to carry the cargo "at the ports through which such cargo would have been shipped but for the Act." Pet. 12. According to petitioners, if no U.S.-flag vessels serve a particular port, the 75% goal does not apply so that any (and all) government cargo may be shipped on available foreign-flag vessels. That is true, petitioners assert, even though the 75% goal is not met on a nationwide basis.

Petitioners' contention lacks any support in the language of the statute. The Availability Clause of the Act, which is at the heart of this case, states that "the appropriate agency or agencies shall take such steps as may be necessary and practicable to assure that at least [75] per centum of the gross tonnage of such * * * commodities * * * which may be transported on ocean vessels shall be transported on privately owned United States-flag commercial vessels, *to the extent such vessels are available at fair and reasonable rates for United States-flag commercial vessels.*" 46 U.S.C. App. 1241(b)(1) (Supp. V 1987) (emphasis added). The plain meaning of this language is that the "availability" of U.S.-flag vessels turns on whether such vessels can be found "at fair and reasonable rates." Thus, a U.S.-flag vessel's "availability" turns on its rates, not on whether it serves a particular port.[5] There is simply nothing in

[5] Petitioners are thus wrong in suggesting (Pet. 14-21) that the regulations impose an absolute requirement that 75% of Title II commodities be shipped on U.S.-flag vessels "under all circumstances." If, for any reason, U.S.-flag vessels are not

the Act that supports petitioners' view that the CCC must break the United States down into various ports when it attempts to reach the 75% goal for U.S.-flag ships.

Petitioners' view of the Cargo Preference Laws is also contrary to the Act's main purpose to preserve and promote the U.S. merchant marine. See Pet. App. 8. In 1985, Congress increased the percentage requirement from 50% to 75% for Title II cargo. Congress stated that its objectives were "to take immediate and positive steps to promote the growth of the cargo carrying capacity of the United States merchant marine" and "to improve the efficiency of administration of both the commodity purchasing and selling and the ocean transportation activities associated with export programs by the Department of Agriculture." 46 U.S.C. App. 1241d(b)(2) and (4) (Supp. V 1987). Thus, it is clear that Congress intended for more cargo to move on U.S.-flag vessels. Under petitioners' "port specific" theory, however, much more cargo would be shipped on foreign-flag vessels—a result opposite from Congress's intent. In short, petitioners' view of the Act would lead to the improbable result of transforming the "Availability Clause" from a provision giving the government flexibility to ship on foreign-flag vessels when U.S.-flag rates are excessive, into an entitlement clause for foreign-flag vessels. See Pet. App. 11.

Petitioners' claim is also at odds with other language in the Act. For example, the Act's 75% goal applies to "any commodities" which "the United States shall procure, contract for, or otherwise obtain for its own account, or shall furnish to or for the

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available at fair and reasonable rates, then cargo may be shipped on foreign-flag vessels. See Pet. App. 9.

account of any foreign nation without provision for reimbursement." 46 U.S.C. App. 1241(b)(1) (Supp. V 1987). That language, at the least, suggests that the Act's 75% goal is to be applied to *all* commodities covered by the Act, not merely to cargo that may be shipped from ports served by U.S.-flag vessels.

Lastly, the 1985 amendments clearly reflect Congress's understanding that the percentage goal of the Cargo Preference Laws would be applied on a nationwide basis. In 1985, Congress responded to complaints from interests aligned with the Great Lakes ports by "setting aside" certain amounts of Title II cargo to the Great Lakes ports, 46 U.S.C. App. 1241f(c)(2)(B) (Supp. V 1987), and by changing the calendar year for purposes of meeting the Act's requirements. 46 U.S.C. App. 1241f(c)(2)(A). As the court of appeals explained, "[t]he Great Lakes grandfather clause and the new accounting year in § 1241f make sense only if KCCO is entitled to use a nationwide baseline." Pet. App. 10-11. For all these reasons, therefore, the CCC's regulations are consistent with, and reasonable in light of, the Cargo Preference Laws.

2. Petitioners contend that the court of appeals erred in giving any deference to the CCC's view of the Cargo Preference Laws. That contention is plainly without merit. In *INS* v. *Cardoza-Fonseca*, 480 U.S. 421 (1987), the Court stressed that, in the "process of filling 'any gap left, implicitly or explicitly, by Congress,' the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program." *Id.* at 448 (quoting *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984)). Thus, as the court of appeals

noted below, "the role of the Executive Branch in filling the interstices left by statutes that commit a subject to executive discretion is beyond question." Pet. App. 9-10. See also *NLRB* v. *United Food & Commercial Workers Union*, 108 S. Ct. 413, 421 (1987) (applying *Cardoza-Fonseca* and *Chevron* in noting that agency is entitled to deference "as long as its interpretation is rational and consistent with the statute").

Here, there can be no doubt that Congress gave federal agencies, including the CCC, wide discretion in administering the Act. The Act commands that the federal agencies "*shall* take such steps as may be *necessary and practicable* to assure" that the 75% target is met. 46 U.S.C. App. 1241(b)(1) (Supp. V 1987) (emphasis added). Undoubtedly, the "necessary and practicable" steps that the federal respondents are required to undertake may include allocating the procured cargo to ports served by U.S.-flag vessels if the rates of those vessels are fair and reasonable. As the court of appeals explained, "nothing [in Section 1241(b)(1) or Section 1241f] says how the KCCO shall decide where to buy the commodities, which port to move them to, and how to export them." Pet. App. 11.[6]

[6] Contrary to petitioners' contention (Pet. 16-23), nothing in the legislative history of the Cargo Preference Laws supports petitioners' view that the federal respondents are required to ignore the Act's 75% goal when selecting ports from which to ship Title II cargo. As the court of appeals noted, the legislative history of the Cargo Preference Laws "does not speak to the question" raised by petitioners. Pet. App. 10. The court properly rejected as unpersuasive the remarks of various witnesses in hearings. As the court noted, "[u]nless repeated in the committee reports (none was), such statements go unnoticed by Congress and cannot inform, or help us to understand, anyone's vote." *Ibid.* The court thus properly opined that "[s]tatutory structure is much more reliable as a guide to meaning, and the structure of these statutes supports the agencies' position." *Ibid.* See *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 311-312 (1979) (noting that the underlying "nature" of a statutory provision is "[o]f greatest significance" in interpreting the provision). In any event, many aspects of the history of the Cargo Preference Laws support the CCC's regulations. See, *e.g.*, Senate Comm. on Interstate and Foreign Commerce, *Influence of Cargo Preference Statutes on the Surplus Agricultural Disposal Program*, S. Rep. No. 2376, 84th Cong., 2d Sess. 13-14 (1956) (inviting the "attention of those who expressed the opinion that [the Act] is overly restrictive" to the "necessary and practicable" and the "fair and reasonable rate" clauses and noting wide discretion accorded federal agencies in administering the Act under these clauses).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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